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No. 85-1831

In The
Supreme Court of the United States
October Term, 1985

OTIS ELEVATOR COMPANY, a
Florida corporation,

Petitioner,

v.

RUST ENGINEERING COMPANY,
an Alabama corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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11 pp

QUESTION PRESENTED FOR REVIEW

Respondent would prefer to present the question as follows:

1. Whether this Court has jurisdiction to grant certiorari when no special or important reasons for the granting of the writ are presented and none of the criteria set forth in Rule 17 exist.

* * *

Should the Court consider the application of *Slavin v. Kay* or the questions as presented by Petitioner, they should be stated as follows:

2. Whether, in a personal injury case, a building contractor is relieved of liability for negligence when the building is completed and accepted by the owner and the alleged defective condition is open and obvious.

3. Whether an elevator repair company, sued for personal injuries due to negligent maintenance and repair is a joint tortfeasor with a building contractor who constructed the elevator shaft and the building 45 years before the date of injury so as to give rise to a claim for contribution under Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31 (1975).

4. Whether there were any genuine issues of a material fact thus precluding summary judgment for the Defendant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 5

Slavin v. Kay, 108 So.2d 462 (Fla. 1959) 4, 6

OTHER AUTHORITIES

28 U.S.C.A., Sec. 1254 1

Rule 17, Supreme Court Rules 1, 3, 4, 5

JURISDICTION

This is a diversity case, removed from the Circuit Court in and for Duval County, Florida to the United States District Court for the Middle District of Florida.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254. Rule 17, Supreme Court Rules, Considerations governing review on certiorari, is neither mentioned nor discussed. Neither the Petition for this Writ of Certiorari nor the Supplemental Appendix contain proof of service as required by the Rules. But undersigned counsel certifies that the Petition was received in his office on May 8, 1986. The Supplemental Appendix was received May 15, 1986.

If the appendix is an integral part of the Petition, the Petition was untimely filed—not within the 60 days required; and that, alone, could be the basis of a denial of the writ. However, other jurisdictional objections are set forth below.

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STATEMENT OF THE CASE

Respondent, Rust Engineering Company* (hereinafter "Rust") has no particular quarrel with the general Statement of the Case and facts as presented by Otis Elevator Company (hereinafter "Otis") except for the

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* Rust Engineering Company is a wholly owned subsidiary of Rust International Corporation, which is a wholly owned subsidiary of The Henley Group.

fact that various statements made under this section in Petitioner's Brief are not supported by anything in the record which was before the trial court; for example the statements on page 6 as to what the evidence "tended to show" . . . that a possible reason for the malfunction "was caused by excessive moisture in the elevator hoistway, etc." Neither does the Petition or Appendix contain the Answer to this contribution complaint which was filed by Rust. But the essence of the defenses are set forth in the Order, granting Rust's Motion for Summary Judgment (Petitioner's Supplemental Appendix, p. 3). Those defenses were, first, the alleged defect in the construction was an open and obvious condition. The law is clear that, when a building contractor completes the job and turns it over to the owner, and it is accepted by the owner, the contractor is not liable for injuries to third parties on the premises if the condition was open and obvious as distinguished from latent or hidden.

Secondly, under the cases cited by the District Court, and the applicable facts, Otis Elevator Company and Rust Engineering Company were not joint tortfeasors, where contribution would apply, since there was no common duty or common burden existing between the two toward the State Court Plaintiff who originally sued Otis. The injury did not arise out of the same transaction or series of transactions between the present parties.

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SUMMARY OF ARGUMENT

1. The Writ should be denied because the Court lacks jurisdiction to consider, by certiorari, the Per Cur-

iam Affirmance of the Eleventh Circuit Court of Appeals entered January 22, 1986 as none of the considerations governing review on certiorari as set forth in Rule 17, Supreme Court Rules, exist.

2. The Petition is frivolous, and without merit, on its face in that this litigation involves the granting of a summary judgment in a personal injury tort case solely applying Florida law and there is nothing in the District Court's Order granting a summary judgment, and nothing in the Court of Appeals' decision (which is the only "record" before the Court) to indicate the existence of any genuine issue of a material fact as to Rust's liability to Otis.

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ARGUMENT

As this Court knows better than anyone, Rule 17, Supreme Court Rules, provides that this type of review is not a matter of right, but of judicial discretion, and "will be granted *only* when there are *special and important reasons* therefor." (Emphasis ours) The Rule then gives some examples to indicate the character of reasons that will be considered. They are:

(a) When there is conflict with a decision of another Federal Court of Appeals on the same matter, or the Court of Appeals has decided a federal question in conflict with a state court of last resort, or has departed "from the accepted and usual course of judicial proceedings" or whether this Court should exercise its power of supervision;

(b) When a State Supreme Court has decided a federal question which conflicts with a decision of another State Supreme Court or a Federal Court of Appeals; or

(c) When the Court of Appeals has decided an important question of federal law which has not been settled by this Court.

None of the above criteria exist in this case. This litigation originated by the filing of a typical personal injury tort case in a Florida state court. When Petitioner was required to compensate that particular injured person, and sued for contribution under Florida's Uniform Contribution Among Tortfeasors Act, it was removed to the United States District Court, as a diversity case. As the Petitioner itself recites, its Petition, p. 3, Rust lost before the arbitration panel under this District's pilot Court Annexed Arbitration Program.* Summary judgment for the Defendant Rust was granted. The Eleventh Circuit Court of Appeals affirmed, without opinion; and now the Petitioner wants this Court, already inundated by matters of major importance under the guidelines of Rule 17, to simply review the application of what facts appear in the record, which are precious few, to somehow rule that the District judge erroneously applied *Slavin v. Kay*, a Florida Supreme Court decision.

The Petition does not even address the second ground for the granting of the summary judgment, i.e., it is not a proper contribution case to begin with.

Respondent feels it is not necessary or appropriate to call the Court's attention to but a single earlier de-

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* non-binding.

cision, feeling that the below quoted language still prevails.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). This was an action for damages brought by the plaintiff, petitioner below, in the District Court for Woodbury County, Iowa, to compensate her for her mental pain and suffering on account of alleged treatment of her deceased husband's body by the defendant funeral home. There was there, unlike here, an arguable constitutional point in that the contract of sale of the burial lot limited "burial privileges" to members of the Caucasion race. There was an Iowa statute making it unlawful to deny burial privileges solely because of race or color.

The Petition was dismissed as improvidently granted, the court saying:

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrasing conflict of opinion and authority between Circuit Courts of Appeal."

Further, after taking note of the long and valuable history of the then Rule 19 (now Rule 17) "formulated 30 years ago" (and this was a 1955 case) and even considering that there may be a federal question and it may be "of substance" in that it may present an intellectually interesting and solid problem, the court concluded:

> "But this Court does not sit to satisfy a scholarly interest in such issues. *Nor does it sit for the benefit of the particular litigants."* (Emphasis ours)

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CONCLUSION

For the reasons mentioned above, in addition to the reason that this Court is not going to be bothered with determining whether or not there were disputed issues of fact on what is before it at the present time, or that *Slavin v. Kay* was misapplied, the Petition for Certiorari should be denied.

Respectfully submitted,

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